

EXHIBIT A

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

JONATHAN RETTA, KIRSTEN
SCHOFIELD, and JESSICA MANIRE
on Behalf of Themselves and all Others
Similarly Situated,

Plaintiffs,

v.

MILLENNIUM PRODUCTS, INC., and
WHOLE FOODS MARKET, INC.,

Defendants.

Case No. 2:15-cv-01801-PSG-AJW

**~~THIRD-FOURTH~~ AMENDED CLASS
ACTION COMPLAINT**

JURY TRIAL DEMANDED

1 Plaintiffs Jonathan Retta, Kirsten Schofield, and Jessica Manire (“Plaintiffs”)
 2 bring this action on behalf of themselves and all others similarly situated against
 3 Defendant Millennium Products, Inc. (“Millennium” ~~or “Defendant”~~ and Defendant
 4 Whole Foods Market, Inc. (collectively, “Defendants”). Plaintiffs make the
 5 following allegations pursuant to the investigation of their counsel and based upon
 6 information and belief, except as to the allegations specifically pertaining to
 7 themselves, which are based on personal knowledge.

8 INTRODUCTION

9 1. Millennium Products, Inc. has passed off millions of bottles of its wildly
 10 successful kombucha beverages as non-alcoholic, when, in fact, the beverages
 11 contain two to seven times the legal limit for non-alcoholic beverages. Having been
 12 caught selling alcoholic kombucha beverages to unsuspecting customers in 2006 and
 13 2010, Millennium decided to market and distribute an alcoholic version of its
 14 kombucha products (the “Classic” kombucha line) and a “non-alcoholic” version
 15 (the “Enlightened” line), knowing that the non-alcoholic line has a much greater
 16 market appeal and could be sold in far more retail locations. But the purported
 17 distinction between the “Classic” and “Enlightened” lines is a sham designed to
 18 confuse the public and government regulators, as both lines of products contain
 19 alcohol levels far surpassing the legal limit for non-alcoholic beverages.

20 2. Millennium’s marketing campaign also takes advantage of high
 21 consumer demand for antioxidants by touting the antioxidant content in its
 22 kombucha beverages in precisely the manner the Food and Drug Administration
 23 (“FDA”) sought to prohibit by establishing the antioxidant labeling requirements set
 24 forth in 21 C.F.R. § 101.54(g). Millennium has plastered misleading antioxidant
 25 messaging on every side of its GT’s Enlightened Kombucha and Enlightened
 26
 27

1 Synergy (collectively, “the Enlightened line” or “Enlightened Kombucha”¹)
 2 beverage labels. The simple truth is, however, that Enlightened Kombucha does not
 3 have even a single nutrient that the FDA recognizes and approves of for labeling
 4 statements using the term “antioxidant.” Because the antioxidant statements on
 5 Enlightened Kombucha’s labels are unauthorized and misleading nutrient content
 6 claims proscribed by the FDA, Enlightened Kombucha is misbranded and
 7 improperly labeled in violation of the Food, Drug, and Cosmetic Act, and
 8 corresponding state laws as described herein. Accordingly, Millennium has sold
 9 misbranded products using misleading advertising to millions of consumers, who
 10 relied on Millennium’s advertising and were injured as a result.

11 3. Plaintiffs Retta, Manire, and Schofield purchased numerous bottles of
 12 Enlightened Kombucha based on Millennium’s-Defendants’ misleading advertising
 13 and labeling of the products.

14 4. Plaintiffs seek relief in this action individually, and on behalf of all
 15 purchasers of Enlightened Kombucha, for Millennium’s-Defendants’ violations of
 16 the California Consumer Legal Remedies Act (“CLRA”), Civil Code §§ 1750, *et*
 17 *seq.*, Unfair Competition Law (“UCL”), Bus. & Prof. Code §§ 17200, *et seq.*, False
 18 Advertising Law (“FAL”), Bus. & Prof. Code §§ 17500, *et seq.*, and New York’s
 19 Deceptive and Unfair Trade Practices Act, New York General Business Law § 349
 20 (“NYGBL”).

21 PARTIES

22 5. Plaintiff Jonathan Retta is a citizen of Virginia, residing in Annandale.
 23 Within the past three years, Mr. Retta purchased GT’s Enlightened Kombucha:
 24 Multi-Green and Enlightened Synergy: Mystic Mango from Whole Foods, in
 25 Washington, D.C. and New York. Mr. Retta purchased GT’s Enlightened
 26

27 ¹ “Enlightened Kombucha” refers to every flavor of Millennium’s GT’s Enlightened
 28 Kombucha and Enlightened Synergy lines, as described herein.

1 Kombucha: Multi-Green and Enlightened Synergy: Mystic Mango relying on
 2 statements on the bottles' labels, including the following statements that characterize
 3 the level of antioxidants in the beverages:

- 4 • "It has a lighter and smoother personality than our original formula
 5 with the same high nutritional value that you expect from us. With a
 6 unique blend of proprietary probiotics and powerful antioxidants, each
 7 bottle is designed to nourish your body from inside out."

8 Mr. Retta would not have purchased GT's Enlightened Kombucha: Multi-Green and
 9 Enlightened Synergy: Mystic Mango, or would have paid significantly less for the
 10 products, had he known that these statements were unauthorized, and that
 11 Millennium misbranded the products and mischaracterized the level, amount, and
 12 nature of the antioxidants in the bottles. Further, Mr. Retta purchased the products
 13 with the belief that the products were non-alcoholic. The labels of the products Mr.
 14 Retta purchased did not bear a government warning concerning the consumption of
 15 alcoholic beverages, or any other warning concerning the alcoholic content of the
 16 products, and Mr. Retta did not have to show any identification of his age in order to
 17 purchase the products. Mr. Retta would not have purchased the products had he
 18 known that they contained significant levels of alcohol or were considered alcoholic
 19 beverages. Mr. Retta suffered injury in fact and lost money as a result of
 20 Millennium's deceptive, misleading, unfair and fraudulent practices described
 21 herein. Further, should Mr. Retta encounter any Enlightened Kombucha in the
 22 future, he could not rely on the truthfulness of the labels' statements characterizing
 23 the nature and level of antioxidants in the beverages, absent corrective advertising or
 24 the addition of antioxidant nutrients with established RDIs to the beverages. In
 25 addition, should Mr. Retta encounter any Enlightened Kombucha products in the
 26 future, he could not rely on the labels' statement that the products only contain a
 27 "trace amount of alcohol." However, Mr. Retta would still be willing to purchase the
 28

1 current formulations of Enlightened Kombucha, absent the price premium, so long as
2 Millennium engages in corrective advertising.

3 6. Plaintiff Kirsten Schofield is a citizen of Kentucky, residing in
4 Louisville. Within the past three years, Ms. Schofield purchased GT's Enlightened
5 Kombucha: Original and Gingerade, and Enlightened Synergy: Raspberry Chia, from
6 Kroger, Whole Foods, and Earth Fare, in Kentucky, South Carolina, and Virginia.
7 Ms. Schofield purchased GT's Enlightened Kombucha: Original and Gingerade, and
8 Enlightened Synergy: Raspberry Chia beverages relying on statements on the
9 bottles' labels, including the following statements that characterize the level of
10 antioxidants in the beverages:

- 11 • "It has a lighter and smoother personality than our original formula with
12 the same high nutritional value that you expect from us. With a unique
13 blend of proprietary probiotics and powerful antioxidants, each bottle is
14 designed to nourish your body from inside out."
- 15 • "Often called 'runner's food', chia is a nutrient-rich superfood that
16 provides sustained energy for your body. Packed with more than 8
17 times the omega-3s found in salmon, this small seed has big nutritional
18 value. With more antioxidants than blueberries and more fiber than
19 oatmeal, see for yourself how chia brings new life to our GT's
20 Kombucha."

21 Ms. Schofield would not have purchased GT's Enlightened Kombucha: Original and
22 Gingerade, and Enlightened Synergy: Raspberry Chia, or would have paid
23 significantly less for the products, had she known that these statements were
24 unauthorized, and that Millennium misbranded the products and mischaracterized the
25 level, amount, and nature of the antioxidants in the bottles. Further, Ms. Schofield
26 purchased the products with the belief that the products were non-alcoholic. The
27 labels of the products Ms. Schofield purchased did not bear a government warning
28

concerning the consumption of alcoholic beverages, or any other warning concerning the alcoholic content of the products, and Ms. Schofield did not have to show any identification of her age in order to purchase the products. Ms. Schofield would not have purchased the products had she known that they contained significant levels of alcohol or were considered alcoholic beverages. Ms. Schofield suffered injury in fact and lost money as a result of Millennium's deceptive, misleading, unfair and fraudulent practices described herein. Further, should Ms. Schofield encounter any Enlightened Kombucha in the future, she could not rely on the truthfulness of the labels' statements characterizing the nature and level of antioxidants in the beverages, absent corrective advertising or the addition of antioxidant nutrients with established RDIs to the beverages. In addition, should Ms. Schofield encounter any Enlightened Kombucha products in the future, she could not rely on the labels' statement that the products only contain a "trace amount of alcohol." However, Ms. Schofield would still be willing to purchase the current formulations of Enlightened Kombucha, absent the price premium, so long as Millennium engages in corrective advertising.

7. Plaintiff Jessica Manire is a citizen of Colorado, residing in Denver. Within the past three years, Ms. Manire purchased GT's Enlightened Kombucha: Botanic No. 3 and Botanic No. 9, and Enlightened Synergy: Trilogy, Gingerberry, Mystic Mango, and Guava Goddess, from Whole Foods ~~and Vitamin Cottage, in Colorado, California, Texas, and New York, and from Vitamin Cottage in Colorado, Texas, and New York.~~ Ms. Manire purchased GT's Enlightened Kombucha: Botanic No. 3 and Botanic No. 9, and Enlightened Synergy: Trilogy, Gingerberry, Mystic Mango, and Guava Goddess relying on statements on the bottles' labels, including the following statements that characterize the level of antioxidants in the Beverages:

- "It has a lighter and smoother personality than our original formula with the same high nutritional value that you expect from us. With a

1 unique blend of proprietary probiotics and powerful antioxidants, each
 2 bottle is designed to nourish your body from inside out.”

3 Ms. Manire would not have purchased GT’s Enlightened Kombucha: Botanic No. 3
 4 and Botanic No. 9, and Enlightened Synergy: Trilogy, Gingerberry, Mystic Mango,
 5 and Guava Goddess, or would have paid significantly less for the products, had she
 6 known that these statements were unauthorized, and that Millennium misbranded the
 7 products and mischaracterized the level, amount, and nature of the antioxidants in
 8 the bottles. Further, Ms. Manire purchased the products with the belief that the
 9 products were non-alcoholic. The labels of the products Ms. Manire purchased did
 10 not bear a government warning concerning the consumption of alcoholic beverages,
 11 or any other warning concerning the alcoholic content of the products, and Ms.
 12 Manire did not have to show any identification of her age in order to purchase the
 13 products. Ms. Manire would not have purchased the products had she known that
 14 they contained significant levels of alcohol or were considered alcoholic beverages.
 15 Ms. Manire suffered injury in fact and lost money as a result of Millennium’s
 16 deceptive, misleading, unfair and fraudulent practices described herein. Further,
 17 should Ms. Manire encounter any Enlightened Kombucha in the future, she could not
 18 rely on the truthfulness of the labels’ statements characterizing the nature and level
 19 of antioxidants in the beverages, absent corrective advertising or the addition of
 20 antioxidant nutrients with established RDIs to the beverages. In addition, should Ms.
 21 Manire encounter any Enlightened Kombucha products in the future, she could not
 22 rely on the labels’ statement that the products only contain a “trace amount of
 23 alcohol.” However, Ms. Manire would still be willing to purchase the current
 24 formulations of Enlightened Kombucha, absent the price premium, so long as
 25 Millennium engages in corrective advertising.

26 8. Defendant Millennium Products, Inc. is a California corporation located
 27 at 4646 Hampton St., Vernon, California 90058. Millennium manufactures,

1 advertises, sells, distributes, and markets Enlightened Kombucha as alleged herein
 2 nationwide, including in California and New York. Millennium's misleading
 3 marketing, advertising and product information concerning the character and level of
 4 antioxidants in Enlightened Kombucha was conceived, reviewed, approved, and
 5 otherwise controlled from Millennium's California headquarters. Millennium's
 6 misleading marketing concerning the antioxidant content of Enlightened Kombucha
 7 was coordinated at, emanated from, and was developed at its California
 8 headquarters. Further, Millennium's misleading marketing, advertising and labeling
 9 concerning the alcohol content of Enlightened Kombucha was conceived, reviewed,
 10 approved, and otherwise controlled from Millennium's California headquarters.
 11 Millennium's misleading marketing and labeling concerning the alcohol content of
 12 Enlightened Kombucha was coordinated at, emanated from, and was developed at its
 13 California headquarters. All critical decisions regarding the misleading antioxidant
 14 and alcohol marketing of Enlightened Kombucha were made in California. Further,
 15 Millennium's website instructs that customer correspondence be directed to a
 16 California address.

17 9. Defendant Whole Foods Market, Inc. is a Texas corporation and is
 18 headquartered in Austin, Texas. Defendant Whole Foods Market, Inc. sells,
 19 distributes, and advertises Enlightened Kombucha as alleged herein nationwide,
 20 including in California and New York.

21 8. —

22 **JURISDICTION AND VENUE**

23 9.10. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §
 24 1332(d)(2)(A) because this case is a class action where the aggregate claims of all
 25 members of the proposed class are in excess of \$5,000,000, exclusive of interest and
 26 costs, and Plaintiffs, as well as most members of the proposed class, are citizens of
 27

1 states different from the states of Defendants. ~~Millennium has~~ Defendants have sold
2 hundreds of thousands, if not millions, of bottles of Enlightened Kombucha.

3 ~~10-11.~~ This Court has general jurisdiction over ~~Defendant Millennium~~ because
4 ~~Defendant it~~ is headquartered in California. Further, ~~Defendant the Court has~~
5 general jurisdiction over all Defendants because Defendants conducts substantial
6 business within California such that Defendants ~~has have~~ significant, continuous, and
7 pervasive contacts with the State of California.

8 ~~11-12.~~ Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because the
9 challenged mislabeling, misbranding, and marketing practices have been
10 disseminated and committed in this District and because ~~Defendant Millennium~~ is
11 headquartered in this District.

12 **FACTS COMMON TO ALL CAUSES OF ACTION**

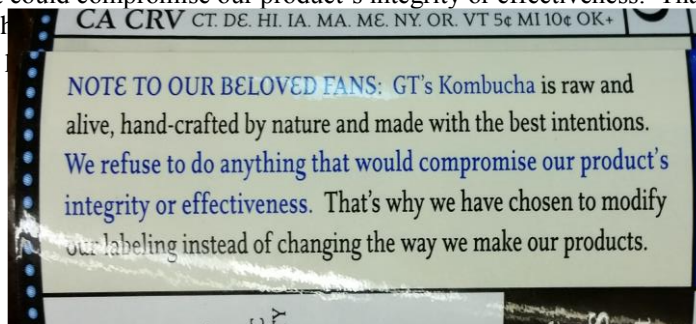
13 **Millennium's Defendants' "Non-Alcoholic" Kombucha Beverages Are Greater
Than .5% Alcohol By Volume**

14 ~~12-13.~~ Millennium's GT's Kombucha Beverages – comprised of the "G.T.'s
15 Kombucha" and "Synergy" brands - are nearly identical products, with identical
16 advertising, using different names. The name "kombucha" itself comes from the
17 common name for what is essentially a fermented tea drink. Kombucha is made of
18 tea that ferments for up to a month while a "blob" of bacteria known as "scooby" (for
19 symbiotic colony of bacteria and yeast) floats on top. The scooby purportedly "eats
20 the sugar, tannic acids, and caffeine in the tea, and creates a cocktail of live
21 microorganisms." Basic chemistry explains that the scooby converts the sugar into
22 carbon dioxide and alcohol. Millennium's "G.T.'s Kombucha" brand is advertised
23 as 100 percent kombucha, while the bottles of the "Synergy" brand are labeled as
24 "95% G.T.'s Kombucha," with the other 5 percent consisting of various juices added
25 for taste.

16 ~~13-14.~~ In 2010, major retailers throughout the country, including Defendant
17 Whole Foods Market, Inc., were forced to immediately stop selling GT's Kombucha
28

1 Beverages because it was discovered that the beverages contained alcohol levels as
2 high as 2.5 percent by volume, roughly five times the legal limit for non-alcoholic
3 beverages. In response, Millennium released an “Enlightened” line of the products,
4 named “Enlightened Synergy” and “GT’s Enlightened Kombucha,” and a “Classic”
5 line of kombucha products. The Enlightened line was purportedly slightly altered to
6 ensure that the products did not exceed the 0.5 percent alcohol by volume threshold,
7 while the Classic retained the original alcoholic formula. The labels of the “Classic”
8 line state:

9 NOTE TO OUR BELOVED FANS: GT’s Kombucha is raw and alive, hand-
10 crafted by nature and made with the best intentions. We refuse to do anything
11 that could compromise our product’s integrity or effectiveness. That’s why
12 we have chosen to modify our labeling instead of changing the way we make
13 our products.



14 15. A display on ~~Defendant’s~~ Millennium’s website summarized that the
15 “Classic” line retained the “Original” alcoholic formula:

16 Once An Original...Now A Classic.

17 14. We’re proud to bring back the formula that started it all. Must be 21
18 years or older to purchase.

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15-16. Millennium's transition from a single line of kombucha beverages to two separate lines of kombucha beverages, the "Classic" and "Enlightened" lines, however, is a sham. In fact, both the Classic and Enlightened versions of the products contain alcohol above the 0.5 percent by volume threshold set by Federal and State laws regulating the sale, marketing, labeling, and distribution of alcoholic beverages.

16-17. The front of the labels of the Classic line, including Classic Kombucha and Classic Synergy,² now bear a prominent display stating, in capitalized letters, "CONTAINS ALCOHOL MUST BE 21 OR OLDER TO PURCHASE." The beverages' caps or lids are wrapped in a removable wrapping stating "over 21." The Classic line of beverages also include the following federally mandated government warning on their labels:

GOVERNMENT WARNING: (1) ACCORDING TO THE SURGEON GENERAL, WOMEN SHOULD NOT DRINK ALCOHOLIC BEVERAGES DURING PREGNANCY BECAUSE OF THE RISK OF BIRTH DEFECTS. (2) CONSUMPTION OF ALCOHOLIC BEVERAGES IMPAIRS YOUR

² See Exhibit A for an example of a Classic Kombucha label. See Exhibit B for an example of a Classic Synergy label.

1 ABILITY TO DRIVE A CAR OR OPERATE MACHINERY, AND MAY
2 CAUSE HEALTH PROBLEMS.

3 Just below the government warning, the Classic labels state: "Kombucha is a
4 cultured tea that is low in alcohol however federal law requires a warning statement
5 on any product that may contain more than 0.5% of alcohol per volume."



15 17-18 Just below the Nutrition Facts section, the Classic labels state: "**This**
16 **product is considered a beer** and contains a natural effervescence. Please open
17 carefully." (emphasis added).

18 18-19 The labels of the Enlightened line, however, do not contain any of the
19 aforementioned displays, warnings, or markings concerning the alcohol content of
20 the beverages. Unlike the Classic line, ~~the Defendants sell the~~ Enlightened line ~~is~~
21 ~~sold~~ to persons of any age, including those under the age of 21. The only mention of
22 alcohol on the labels of the Enlightened line is a note below the Nutrition Facts
23 section stating that "This product contains a trace amount of alcohol." The following
24 is an image of a bottle of "Classic" Synergy: Strawberry Serenity and "Enlightened"
25 Synergy: Strawberry Serenity:
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27
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As can be seen in the image, the “Classic” beverage bears the aforementioned wrapping stating “over 21” on the lid and a prominent “CONTAINS ALCOHOL” statement on the front of the label, while the “Enlightened” label is silent as to any potential alcohol in the beverage.

19-20 On every label of every flavor of Enlightened Kombucha, the first ingredient is listed as either “100% G.T.’s organic raw kombucha” (on the Enlightened Kombucha bottles) or “G.T.’s organic raw kombucha” (on the Enlightened Synergy lines). Just below the Nutrition Facts section of the labels, each label of every flavor of Enlightened Kombucha states, in bold capital letters

1 surrounded by two “heart” (♥) graphics, “♥ THIS IS A RAW FOOD ♥.” Just after
2 this statement, the flavors of Enlightened Kombucha that do not contain chia seeds
3 state “Strands of the culture may appear. These are natural, normal & occur in raw
4 kombucha.”

5 20,21. While pasteurized versions of kombucha products are non-alcoholic, as
6 the pasteurization kills the yeast in the kombucha, raw (unpasteurized) versions of
7 kombucha become alcoholic over time as the living yeast in the beverage converts
8 sugars into alcohol. Such natural conversion of sugar to alcohol in unpasteurized
9 kombucha beverages can result in alcohol levels as high as 4 percent alcohol by
10 volume, roughly the same alcohol content as regular beer.

11 21. —Because both the “Classic” and “Enlightened” versions of Millennium’s
12 kombucha beverages are unpasteurized, each set of beverages predictably undergoes
13 a natural fermentation process where the yeast in the beverages converts the sugar in
14 the products into alcohol. While Millennium claims that it has found a way to brew
15 its Enlightened line of products such that the products never cross the 0.5 percent
16 alcohol threshold post-bottling, several rigorous independent tests show that each of
17 the beverages in the Enlightened line contains greater than 0.5 percent alcohol by
18 volume, are often as alcoholic as their “alcoholic” “Classic” counterpart, and, in
19 some cases, are as alcoholic as traditional beer.

20 22.

21 **Millennium’s History Of Fraudulently Manufacturing Kombucha Beverages**
22 **With Alcohol Levels Above The 0.5 Percent Alcohol By Volume Threshold**

23 22,23. Millennium’s fraudulent marketing and labeling of its kombucha
24 beverages as non-alcoholic, when in fact they contain substantial amounts of alcohol,
25 stretches back at least several years before the 2010 recall, and likely to the
26 formation of the company in 1995.

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1 23-24 For example, on September 1, 2006, Millennium reached a settlement
2 with the Bureau of Alcohol, Tobacco and Firearms (currently operating as the
3 Alcohol and Tobacco Tax and Trade Bureau or “TTB”) for selling kombucha
4 beverages “that contained over 0.5% alcohol without having a basic permit, a
5 violation of 27 U.S.C. 203(b)(1)&(2) and 27 CFR 24.106” and for selling such
6 beverages “without the proper labels [or] labels approvals,” and for distributing the
7 products “without the government warning statement, a violation of 27 U.S.C. 215(a)
8 and 27 CFR 16.21.”³

9 24-25 In 2010, an inspector from the Maine Department of Agriculture noticed
10 that some bottles of kombucha were leaking and bubbling in one of Defendant
11 Whole Foods Market, Inc.’s Portland stores~~a Portland Whole Foods~~, sparking
12 Federal Drug Administration (“FDA”) and TTB investigations concerning the
13 alcohol content of various kombucha products, including GT’s Kombucha. After it
14 was discovered that many kombucha products had alcohol levels as high as 2.5
15 percent by volume, ~~retailers~~ Defendant Whole Foods Market, Inc. pulled kombucha
16 products, including GT’s Kombucha products, off the shelves.

17 25-26 Several other manufacturers of kombucha beverages, such as Honest
18 Tea, owned and operated by the Coca-Cola Company, were unable to reformulate
19 their kombucha beverages to ensure that the products never crossed the 0.5 alcohol
20 by volume threshold at retail or consumption. “Despite reformulating its kombucha
21 drinks in August 2010, Honest Tea found that the level of alcohol in Honest
22 Kombucha – when left at room temperature – increased beyond 0.5 percent. Citing
23 the difficulty in maintaining legal alcohol levels, Honest Tea discontinued the line in
24 December 2010.”⁴

25 ³ A copy of the charge and settlement agreement is attached to this Complaint as
26 Exhibit C.

27 ⁴ Ray Latif, *Kombucha Class Action Suits Settled with GT’s, Honest Tea*,
28 BevNet.com, Nov. 8, 2011. Available at
<http://www.bevnet.com/news/2011/kombucha-class-action-suits-settled-with-gts-honest-tea> (last accessed Sept. 17, 2015).

1 ~~26-27~~ Millennium's C.E.O., GT Dave, however, "was unwilling to radically
2 change [its] process." While "[s]ome brewers use pasteurization to help control the
3 alcohol content in their products, or ferment for shorter periods and add forced
4 carbonation," GT Dave claimed that Millennium "changed the potential for alcohol
5 by controlling the chemistry of the fermentation" for its Enlightened line of
6 kombucha beverages.⁵ As described above, the Enlightened line is a "raw" and
7 "unpasteurized" kombucha, necessarily meaning that the beverages continue to
8 ferment and increase in alcohol over time, especially if left unrefrigerated for even
9 short periods of time. Whatever changes Millennium made to its Enlightened line, if
10 any, are ineffective at curbing the accumulation of alcohol in the products past 0.5
11 percent alcohol by volume through the normal and expected use of the products.

12 **Testing from TTB Accredited Laboratories Shows that the Enlightened Line of**
13 **GT's Kombucha Beverages has Greater than 0.5 Percent Alcohol by Volume**

14 ~~27-28~~ Two independent, TTB certified laboratories, Brewing & Distilling
15 Analytical Services, LLC and ETS Laboratories, conducted tests on multiple batches
16 of GT's Enlightened Kombucha and Enlightened Synergy beverages. Each test
17 showed that every bottle of the products tested contained a level of alcohol by
18 volume greater than 0.5 percent.

19 ~~28-29~~ Brewing & Distilling Analytical Services LLC ("BDAS") conducted
20 tests to determine the level of alcohol by volume in the following products: GT's
21 Enlightened Lavender No. 3, GT's Enlightened Gingerade, GT's Enlightened Multi-
22 Green, GT's Enlightened Citrus, GT's Enlightened Bilberry No. 9, Enlightened
23 Synergy Cosmic Cranberry, Enlightened Synergy Passionberry Bliss, Enlightened
24 Synergy Guava Goddess, Enlightened Synergy Trilogy, and Enlightened Synergy
25 Gingerberry.

26
27 ⁵ Tom Foster, *Meet the King of Kombucha, Inc.*, March 2015. Available at
28 <http://www.inc.com/magazine/201503/tom-foster/the-king-of-kombucha.html> (last
accessed Sept. 17, 2015).

1 ~~29-30~~ Each of these products was subjected to four tests conducted on four
2 separate batches of products. None of the products had passed their stated expiration
3 date at the time of testing.

4 ~~30-31~~ BDAS conducted the following four tests on each of the aforementioned
5 products: (1) test for alcohol by volume one week after purchase where the product
6 was refrigerated prior to testing; (2) test for alcohol by volume one week before the
7 listed expiration date where the product was refrigerated prior to testing; (3) test for
8 alcohol by volume one week after purchase where the product was kept at room
9 temperature prior to testing; (4) test for alcohol by volume one week prior to the
10 listed expiration date where the product was kept at room temperature prior to
11 testing.

12 ~~31-32~~ The smallest percentage of alcohol by volume detected among all the
13 products tested by BDAS amongst all four of the testing methods was 0.96 percent
14 alcohol by volume. Not a single product tested was below the federally mandated
15 0.5 percent alcohol by volume limit. In fact, a majority of the products tested well
16 above 2 percent alcohol by volume at some point prior to the listed expiration date.
17 Further, many of the products tested at close to three percent alcohol by volume at
18 some point prior to the listed expiration date, with one product, Enlightened Synergy
19 Trilogy, testing at 3.81 percent alcohol by volume one week prior to the expiration
20 date.

21 ~~32-33~~ ETS Laboratories conducted similar testing that led to similar results.
22 ETS Laboratories conducted tests concerning the alcohol content of the following
23 products: GT's Enlightened Kombucha Multi Green, GT's Enlightened Kombucha
24 Lavender No. 3, GT's Enlightened Kombucha Original, GT's Enlightened
25 Kombucha Gingerade, GT's Enlightened Kombucha Citrus, Enlightened Synergy
26 Cosmic Cranberry, Enlightened Synergy Guava Goddess, Enlightened Synergy
27 Strawberry Serenity, Enlightened Synergy Mystic Mango, Enlightened Synergy

1 Raspberry Chia, Enlightened Synergy Grape Chia, Enlightened Synergy Black Chia,
2 Enlightened Synergy Trilogy, Enlightened Synergy Passionberry Bliss, and
3 Enlightened Synergy Gingerberry.

4 ~~33~~34. As with the BDAS testing results, the ETS Laboratories results showed
5 that not a single product tested was below the federally mandated 0.5 percent alcohol
6 by volume limit.

7 **Every Enlightened Kombucha Bottle Violates A Host of Federal and State Laws**
8 **Regulating The Labeling Of Alcoholic Beverages**

9 ~~34~~35. On the TTB's website, the TTB states that "TTB's initial testing of
10 kombucha in the marketplace reveals that many of these products contain at least 0.5
11 percent alcohol by volume. These products are alcohol beverages and are
12 consequently subject to regulation."⁶ The TTB states that its "primary concern is to
13 ensure that consumers are not misled about the nature of alcohol beverage products
14 that might be marketed as non-alcoholic beverages. It is important that consumers
15 are adequately informed about the nature of these products."

16 ~~35~~36. In the Frequently Asked Questions portions of its website, the TTB
17 explains in a series of questions and answers the various labeling requirements
18 kombucha beverages must meet if they have more than 0.5 percent alcohol by
19 volume.⁷ One of the "questions" is "Are kombucha containers required to bear a
20 health warning statement?" The TTB "answers" that "[t]he container of any alcohol
21 beverage product sold or distributed in the United States with an alcohol content of
22 0.5 percent or more must bear the health warning statement required by the
23 Alcoholic Beverage Labeling Act of 1998 (ABLA)," citing 27 C.F.R. § 16. In turn,
24 27 C.F.R. § 16.10 defines "Alcoholic beverage" as "any beverage in liquid form
25 which contains not less than one-half of one percent (.5%) of alcohol by volume and
26 is intended for human consumption." 27 C.F.R. § 16.20 goes on to state that "no

27 ⁶ <http://www.ttb.gov/faqs/kombucha-faqs.shtml> (last accessed on Sept. 17, 2015).

28 ⁷ See *id.*

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1 person shall bottle for sale or distribution in the United States any alcoholic beverage
2 unless the container of such beverage bears the health warning statement required by
3 § 16.21.”

4 ~~36:37~~.27 C.F.R. § 16.21 states that “[t]here shall be stated on the brand label
5 or separate front label, or on a back or side label, separate and apart from all other
6 information, the following statement: GOVERNMENT WARNING: (1) According
7 to the Surgeon General, women should not drink alcoholic beverages during
8 pregnancy because of the risk of birth defects. (2) Consumption of alcoholic
9 beverages impairs your ability to drive a car or operate machinery, and may cause
10 health problems.”

11 ~~37:38~~.The TTB’s Frequently Asked Questions also pose the following
12 question: “What if my kombucha product contains less than 0.5 percent alcohol by
13 volume at the time of bottling, but the alcohol content increases to 0.5 percent or
14 more due to continued fermentation in the bottle.” The TTB answers that “[u]nder
15 the law, TTB considers these products alcohol beverages and, as such, the applicable
16 tax rate applies as does the requirement to show the health warning statement.” The
17 TTB goes on to state that “the regulations provide that brewers must use a method of
18 production to ensure that the alcohol content will not increase while in the original
19 container after removal from the brewery.”

20 ~~38:39~~.The TTB also poses the following question: “What if my kombucha is
21 intended to be kept refrigerated, but it is stored by the retailer in an unrefrigerated
22 area, and the alcohol content increases to 0.5 percent alcohol by volume.” The TTB
23 answers that “[r]efrigeration of the product is not an adequate method of ensuring
24 that the alcohol content will not increase while in the original container after
25 removal, because you cannot control whether the product will be refrigerated after
26 removal...[Y]ou must use a method of manufacture (such as pasteurization) that will
27
28

1 ensure that the alcohol content of the beverage will not increase while in the original
2 container after removal.”

3 39-40. Further, the TTB has stated that certain “beers,” including kombucha
4 products, “which are not made from both malted barley and hops but are instead
5 made from substitutes for malted barley (such as sorghum, rice, or wheat) or are
6 made without hops” “must comply with FDA labeling requirements.”⁸ The FDA
7 clarifies that such alcoholic beverages are subject to the nutrition labeling
8 requirements set out at 21 C.F.R. 101.9, and the general requirements of 21 C.F.R.
9 101.3 and 21 C.F.R. 101.4.⁹ As Enlightened Kombucha is “not made from both
10 malted barley and hops” and is “made without hops,” Enlightened Kombucha is also
11 subject to the general nutrition labeling requirements set out by the FDA.
12 Accordingly, the labels of Enlightened Kombucha are subject to the “false and
13 misleading” standard of 21 U.S.C. § 343(a)(1), 21 C.F.R. § 101.54(g) (discussed
14 below), and the corresponding state law counterparts that track the federal standards.
15 *See, e.g.*, Cal. Health & Safety Code § 110100 (“All food labeling regulations and
16 any amendments to those regulations adopted pursuant to the federal act ... shall be
17 the food labeling regulations of this state.”); 1 N.Y.C.R.R. § 259.1 (same). Because
18 both the Classic and Enlightened lines contain alcohol above 0.5 percent by volume,
19 and only the Classic line bears the appropriate government warnings, the
20 Enlightened line is misbranded under the FDA’s labeling requirements, California’s
21 Sherman Food Drug & Cosmetic Law and New York’s Agriculture and Marketing
22 Law, discussed in greater detail below.

23 ⁸ *Id.*; U.S. Food and Drug Administration, *Guidance for Industry: Labeling of*
24 *Certain Beers Subject to the Labeling Jurisdiction of the Food and Drug*
25 *Administration*, December 2014. Available at
<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm166239.htm#ref4> (last accessed Sept. 17, 2015).

26 ⁹ U.S. Food and Drug Administration, *Guidance for Industry: Labeling of Certain*
27 *Beers Subject to the Labeling Jurisdiction of the Food and Drug Administration*,
28 December 2014. Available at
<http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm166239.htm#ref4> (last accessed Sept. 17, 2015).

1 ~~40.41. Millennium's Defendants' sale and~~ marketing of the Enlightened line as
2 non-alcoholic, when in fact it contains substantial amounts of alcohol, also violates a
3 host of State consumer health and safety regulations. For example, California Health
4 & Safety Code Section 25249.2 provides that "[n]o person in the course of doing
5 business shall knowingly and intentionally expose any individual to a chemical
6 known to the state to cause cancer or reproductive toxicity without first giving clear
7 and reasonable warning to such individual, except as provided in Section 25249.10."
8 The method of warning should be a warning that appears on the product's label. See
9 27 Cal. Code of Reg. § 25603(c). Pursuant to Proposition 65, the Safe Drinking
10 Water and Toxic Enforcement Act ("Proposition 65"), California recognizes "Ethyl
11 alcohol in alcoholic beverages" as a chemical known to cause reproductive toxicity.
12 27 Cal. Code of Reg. § 27001(c). "Alcoholic beverage" includes "every liquid or
13 solid containing alcohol, spirits, wine, or beer, and which contains one-half of one
14 percent or more of alcohol by volume and which is fit for beverage purposes either
15 alone or when diluted, mixed, or combined with other substances." *Consumer*
16 *Cause, Inc. v. Arkopharma, Inc.* (2003) 106 Cal. App. 4th 824, 829 (citing Cal. Bus.
17 & Prof. Code § 23004). Because Enlightened Kombucha in fact contains "one-half
18 of one percent or more of alcohol by volume," but the labels do not bear the
19 appropriate warning, the products violate Proposition 65. A warning statement
20 identical to the one prescribed by 27 C.F.R. § 16.21 would suffice to comply with the
21 law and to notify consumers.

22 ~~41.42.~~ While Plaintiffs do not know whether Enlightened Kombucha is below
23 0.5 alcohol by volume at the moment it leaves Millennium's distribution center, what
24 is clear is that the beverages are significantly above the 0.5 threshold at the time of
25 sale and consumption, and are almost as alcoholic as traditional beer a week before
26 their stated expiration dates. Under federal law, ~~Millennium-Defendants~~ cannot turn
27 a blind eye to what happens to ~~its~~ ~~Enlightened Kombucha~~ products after they leave
28

1 ~~its~~ Millennium's facilities, and, considering similar instances of high alcohol levels
2 in Millennium's kombucha products in 2006 and 2010, Plaintiffs allege on
3 information and belief that Millennium knowingly and willfully distributes
4 Enlightened Kombucha in violation of Federal and State laws that require such
5 beverages to contain the government warning, as set out above.

6 ~~42-43.~~ Millennium's unwillingness to treat the 0.5 alcohol by volume threshold
7 seriously can be seen through Millennium C.E.O.'s statements in 2010 concerning
8 being forced to release the Enlightened line due to the recall. Millennium's C.E.O.
9 stated in an interview:

10 The whole .5% alcohol threshold is so arbitrary. It's acting like .4% is not
11 going to do anything but .6% is gonna get you wasted. It's not. A lot of these
12 laws and regulations were created in the 1920's. You can get more alcohol in
13 your system from mouthwash, cough syrup, vanilla extract, cooking wine, an
14 herbal tincture or a dozen other products...It's a little distorted.¹⁰

15 In another interview given around the same time, Millennium's C.E.O. stated:

16 Most of these laws [regarding alcohol content of store-sold beverages] were
17 written around the prohibition period, and the .5 percent threshold is very
18 arbitrary – **there is really no difference with a product that is slightly**
19 **below or above...**Our long-term goal is to change legislation, a mission that
20 will take some time. **We are being asked to control something that is out of**
21 **our control...**That's why it was a confusing time.¹¹

22 (emphasis added). But whatever long-term goals Millennium may have about
23 changing legislation are irrelevant to the fact that the 0.5 alcohol by volume
24 threshold is the law of the land. There is a very big difference between a beverage

25 ¹⁰ Kombuchakamp.com, *GT Dave – Exclusive Interview*, 2010. Available at
26 [https://www.kombuchakamp.com/update-gts-original-enlightened-kombucha-on-the-](https://www.kombuchakamp.com/update-gts-original-enlightened-kombucha-on-the-way-will-stay-raw-and-true-to-ourselves)
27 [way-will-stay-raw-and-true-to-ourselves](https://www.kombuchakamp.com/update-gts-original-enlightened-kombucha-on-the-way-will-stay-raw-and-true-to-ourselves) (last accessed on Sept. 18, 2015).

28 ¹¹ Kelly Green, *What Happened to GT Dave's Kombucha?*, Phoenix New Times,
Oct. 21, 2010. Available at [http://www.phoenixnewtimes.com/restaurants/what-](http://www.phoenixnewtimes.com/restaurants/what-happened-to-gt-daves-kombucha-6533129)
happened-to-gt-daves-kombucha-6533129 (last accessed on Sept. 18, 2010).

1 under and over this limit, as underscored throughout federal and state law in this
2 field going back to the 1930's, the fall of prohibition, and before. One is lawful and
3 the other is not. Further, as discussed above, the Enlightened line is not "slightly"
4 above the legal limit. In fact, most of the beverages in the Enlightened line are at
5 least double the legal limit, with some reaching over seven times the legal limit one
6 week prior to their listed expiration dates. If the natural fermentation of the
7 Enlightened line, such that the beverages become more alcoholic than permitted by
8 law, is "something that is out of [Millennium's] control," Millennium-Defendants
9 cannot and should not sell the products.

10 43:44 Millennium's marketing of the Enlightened line as the non-alcoholic
11 version of its Classic line is highly misleading to a reasonable consumer. Because
12 the Enlightened products do not include any warnings concerning the significant
13 presence of alcohol, consumers, including Plaintiffs, are led to believe that the
14 products are safe to consume when driving a car or operating machinery and pose no
15 safety concerns. To make matters worse, the labels of the Enlightened line state:

16 **Suggested Use: For best results, drink at least one bottle a day. Product**
17 **can be consumed before, during, or after meals.**

18 A "Suggested Use" of an alcoholic beverage of "at least one bottle a day" at any time
19 of the day, including on an empty stomach, and potentially with other medication,
20 creates a very serious health hazard. Like any other forms of alcohol, Enlightened
21 kombucha may in fact cause health problems, is not safe to consume while driving or
22 operating machinery, and may increase the chance of birth defects if consumed
23 during pregnancy. For these reasons, Enlightened Kombucha must bear the
24 government warning mandated by 27 C.F.R. § 16.21 and is misbranded under State
25 and Federal law.

26 **Millennium's Unlawful And Misleading Characterization Of Antioxidants**

1 44-45. Millennium lures customers to buy Enlightened Kombucha with
2 promises that the beverages are packed with “powerful” antioxidants. But
3 Millennium’s advertising flies in the face of identical state and federal laws that bar
4 manufacturers from spouting “antioxidant” claims without including antioxidant
5 *nutrients*, like Vitamins A, C, D, or E, in their beverages to back up their advertising.
6 Tea antioxidants, like EGCG, are not antioxidant nutrients. Since Enlightened
7 Kombucha does not include any antioxidant nutrients identified by the FDA as a
8 source of real nutrition, Millennium’s labeling and advertising deceives consumers
9 into believing that all antioxidants are created equal and that Enlightened Kombucha
10 is a source of nutritional antioxidants.

11 45-46. Specifically, by law, Millennium must disclose on the labels of
12 Enlightened Kombucha precisely which *nutrients* have antioxidant properties.
13 Further, each of these nutrients must have established Reference Daily Intake
14 (“RDI”) standards set by the FDA to prevent manufacturers from claiming that tea is
15 a nutritional source of antioxidants.

16 46-47. Enlightened Kombucha claims to contain a “unique blend” of “powerful
17 antioxidants,” but does not contain even a single antioxidant nutrient with an
18 established RDI. Indeed, Enlightened Kombucha is a type of tea, and the FDA
19 considers tea a food of no nutritional significance. As such, ~~Defendant’s~~
20 Millennium’s labels are misbranded and misleading.

21 47-48. Every flavor in the Enlightened line that does not contain chia seeds¹²
22 bears the following nutrient content claims characterizing the level of antioxidants on
23 the bottles’ labels:

- 24 • “It has a lighter and smoother personality than our original formula
25 with the same high nutritional value that you expect from us. With a

26
27 ¹² The following flavors of Enlightened Synergy contain chia seeds: Black Chia,
28 Cherry Chia, Grape Chia, Green Chia, and Raspberry Chia. None of the flavors of
GT’s Enlightened Kombucha contain chia seeds.

unique blend of proprietary probiotics and powerful antioxidants, each bottle is designed to nourish your body from the inside out.”¹³

~~48-49~~ Every flavor in the Enlightened Synergy line that contains chia seeds bears the following nutrient content claims characterizing the level of antioxidants on the bottles’ labels:

- “RAW CHIA = RAW ENERGY. Often called ‘runner’s food’, chia is a nutrient-rich superfood that provides sustained energy for your body. Packed with more than 8 times the omega-3s found in salmon, this small seed has big nutritional value. With more antioxidants than blueberries and more fiber than oatmeal, see for yourself how chia brings new life to our GT’s Kombucha.”¹⁴

~~49-50~~ The “Nutrition Facts” panel of every flavor of Enlightened Kombucha contains an “ANTIOXIDANTS & ORGANIC ACIDS” segment, which lists “EGCG 100mg” as the amount and type of “antioxidants” in the bottles.

~~50-51~~ Millennium’s common advertising campaign has, for years, touted statements characterizing antioxidants in Enlightened Kombucha as one of the primary reasons to buy the products. In turn, consumers relied and continue to rely on Millennium’s characterization of antioxidants in Enlightened Kombucha when purchasing the products.

Enlightened Kombucha Is Misbranded Under Identical State And Federal Laws

~~51-52~~ Identical federal and California laws regulate the content of labels on packaged food. The requirements of the federal Food, Drug & Cosmetic Act (“FDCA”) were adopted by the California legislature in the Sherman Food Drug & Cosmetic Law (the “Sherman Law”). Under California law “[a]ny food is misbranded if its labeling does not conform with the requirements for nutrient

¹³ See Exhibit D for an example of an Enlightened Synergy label. See Exhibit E for an example of a GT’s Enlightened Kombucha label.

¹⁴ See Exhibit F for an example of an Enlightened Synergy with Chia label.

1 content or health claims as set forth in Section 403(r) [21 U.S.C. Sec. 343(r)] of the
2 federal act and the regulations adopted pursuant thereto.” California Health & Safety
3 Code § 110670.

4 ~~52-53~~. Similarly, New York law also adopts by reference the regulatory
5 requirements under the FDCA. New York's Agriculture and Marketing Law
6 provides in language that mirrors the FDCA, that food shall be deemed misbranded
7 “[i]f its labeling is false or misleading in any particular.” N.Y. Agm. Law § 201(1).
8 Moreover, Part 259.1 of Title 1 of the New York Codes, Rules and Regulations of
9 the State of New York (1 N.Y.C.R.R. § 259.1), incorporates by reference the
10 regulatory requirements for food labeling under the FDCA:

11 For the purpose of the enforcement of article 17 of the Agriculture and
12 Markets Law, and except where in conflict with the statutes of this State or
13 with rules and regulations promulgated by the commissioner, the
14 commissioner hereby adopts the current regulations as they appear in title 21
15 of the Code of Federal Regulations (revised as of April 1, 2013) ... in the area
of food packaging and labeling as follows: ... (3) Part 101 of title 21 of the
Code of Federal Regulations, containing the Federal definitions and standards
for Food Labeling (including Appendices) ...

16 ~~53-54~~. Nutrient content claims using the term “antioxidant” must comply with
17 the requirements listed in 21 C.F.R. 101.54(g). Under 21 C.F.R. § 101.54(g), a
18 nutrient content claim that characterizes the level of antioxidant nutrients present in a
19 food may only be used if: “(1) An RDI (Reference Daily Intake) has been established
20 for each of the nutrients; (2) The nutrients that are the subject of the claim have
21 recognized antioxidant activity ... ; (3) The level of each nutrient that is the subject
22 of the claim is sufficient to qualify for the [type of claim made]; and (4) The names
23 of the nutrients that are the subject of the claim are included as part of the claim
24 (e.g., ‘high in antioxidant vitamins C and E’). Alternatively, when used as part of a
25 nutrient content claim, the term ‘antioxidant’ or ‘antioxidants’ (as in ‘high in
26 antioxidants’) may be linked by a symbol (e.g. an asterisk) that refers to the same
27 symbol that appears elsewhere on the same panel of the product label followed by
28

1 the name or names of the nutrients with recognized antioxidant activity.” The use of
2 a nutrient content claim that uses the term “antioxidant” but does not comply with
3 the requirements of 21 C.F.R. 101.54(g) misbrands a product under section
4 403(r)(2)(A)(i) of the Act.

5 54.55. The regulations regarding antioxidant nutrient content claims have been
6 made clear by prior FDA actions targeting similar or identical claims. For example,
7 on August 23, 2010, the FDA sent Unilever, Inc. a warning letter that specifically
8 identified unauthorized antioxidant nutrient content claims that Unilever made on
9 Lipton Green Tea’s label and on its website. In the letter, the FDA explained that the
10 statement “LIPTON Tea is made from tea leaves rich in naturally protective
11 antioxidants,” did not comply with 21 C.F.R. 101.54(g) because it did not “include
12 the nutrients that are the subject of the claim or use a symbol to link the term
13 ‘antioxidant’ to those nutrients.” Accordingly, the FDA determined that the claim
14 misbranded Lipton Green Tea under section 403(r)(2)(A)(i) of the Act. Likewise,
15 the FDA concluded that the statement “packed with protective FLAVONOID
16 ANTIOXIDANTS” did not comply with 21 C.F.R. 101.54(g) because no RDI has
17 been established for flavonoids. Because the statements were unauthorized nutrient
18 content claims, the FDA concluded that Lipton Green Tea was misbranded.¹⁵

19 55.56. The FDA has explained that violations of 21 C.F.R. 101.54(g) occur
20 even where a nutrient with an established RDI is present in a food bearing a label
21 using the term “antioxidant” if the nutrient with the established RDI does not account
22 for 100% of the claimed antioxidant value. On August 30, 2010, the FDA sent a
23 letter to the Dr. Pepper Snapple Group, manufacturers of Canada Dry Sparkling
24 Green Tea Ginger Ale, warning that its labels were misbranded pursuant to 21 C.F.R.
25 101.54(g). The FDA explained:

26 The nutrient content claim for your Sparkling Green Tea Ginger Ale product
27 of “ENHANCED WITH 200 mg OF ANTIOXIDANTS FROM GREEN TEA

28 ¹⁵ See 8/23/2010 FDA Warning Letter to Unilever, Inc. attached hereto as Exhibit G.

1 & VITAMIN C** **Each 8 oz serving contains 200 mg of antioxidants
2 from Green Tea Flavonoids and Vitamin C” identifies Vitamin C as a nutrient
3 associated with the antioxidant claim. Vitamin C is a nutrient that is a
4 recognized source of antioxidants. Your Nutrition Facts panel declares
5 Vitamin C at 100% of the Daily Reference Value (DRV), which accounts for
6 60 mg of the claimed 200 mg of antioxidants. According to the nutrient
7 content claim on your product label, the remainder 140 mg of antioxidants
8 must be derived from green tea or green tea flavonoids, which are not nutrients
9 with recognized antioxidant activity under 21 CFR § 101.54(g)(2). Therefore,
10 the claim “ENHANCED WITH 200 mg OF ANTIOXIDANTS FROM
11 GREEN TEA & VITAMIN C** **Each 8 oz serving contains 200 mg of
12 antioxidants from Green Tea Flavonoids and Vitamin C” does not meet the
13 requirements of 21 CFR 101.54(g) and misbrands your product under section
14 403(r)(1)(A) of the Act [21 U.S.C. § 343(r)(1)(A)].¹⁶

15 56-57. Of particular relevance here, the labels of Enlightened Kombucha claim
16 that the “Antioxidants” found in the beverages are 100 milligrams of “EGCG.”
17 EGCG stands for Epigallocatechin gallate, and is a type of catechin commonly found
18 in tea. On February 22, 2010, the FDA sent a letter to Redco Foods, Inc. warning
19 Redco that its green tea products violated the FDCA. The FDA determined that
20 Redco’s green tea label bore the following unauthorized nutrient content claim:

21 One of the antioxidants known as EGCG (Epigallocatechin gallate) is
22 abundantly found in tea leaves.

23 The FDA determined that the claim did not comply with 21 C.F.R. 101.54(g)(1)
24 because no RDI has been established for EGCG.¹⁷ In another example, on April 20,
25 2011, the FDA sent a letter to Diaspora Tea & Herb Co., LLC, the manufacturer of
26 Rishi brand teas, warning the company that its White Tea products were misbranded.
27 The FDA determined that the following label claim was an unauthorized nutrient
28 content claim pursuant to 21 C.F.R. 101.54(g)(1) because “White Tea” does not have
an established RDI:

16 See 8/30/2010 FDA Warning Letter to Dr Pepper Snapple Group, attached hereto
as Exhibit H.

17 See 2/22/2010 FDA Warning Letter to Redco Foods, Inc. attached hereto as
Exhibit I.

1 White Tea...contain[s] high concentrations of ...antioxidant polyphenols (tea
catechins)...¹⁸

2 (Omissions and alterations in original). The marketing of EGCG as the antioxidants
3 in Enlightened Kombucha is misleading and misbrands the products because neither
4 tea nor EGCG are recognized nutrients under the FDCA.

5 ~~57-58~~ Further, the labels of Enlightened Kombucha that contain chia seeds
6 tout that “chia is a nutrient-rich superfood,” that chia “has big nutritional value” and
7 that the chia in the beverages contains “more antioxidants than blueberries.” In a
8 July 26, 2013 letter to Waterwheel Premium Foods Pty Limited, the FDA stated that
9 the statement “Chia seeds are known to be an important source of ... antioxidants”
10 on a food product label violates 21 C.F.R. 101.54(g) because it does not name the
11 nutrients that are the subject of the antioxidant claim. Despite Millennium’s
12 statements that chia is a “nutrient-rich superfood” and has “big nutritional value,”
13 chia itself is not a nutrient, and, accordingly, chia is not a nutrient with an established
14 RDI. In another example, in a May 24, 2013 letter to Crop Pharms, the FDA
15 determined that the statement “Black Currants have twice the antioxidants of
16 Blueberries” on a food product violates 21 C.F.R. 101.54(g) because it “characterizes
17 the level of” antioxidants but does not disclose any nutrients with an established
18 RDI. The statement that chia contains “more antioxidants than blueberries”
19 characterizes the level of antioxidant in Enlightened Kombucha, misbrands the
20 products, and misleads consumers.

21 ~~58-59~~ In addition, beverages in the Enlightened line that do not contain chia
22 seeds claim that they have a “high nutritional value” and have a “unique blend of ...
23 powerful antioxidants.” In a January 31, 2012 letter to CAW Industries, Inc., the
24 FDA stated that the statement “very powerful antioxidant” characterizes the level of
25 antioxidants in a product and violates the requirements of 21 C.F.R. 101.54(g) where
26

27 ¹⁸ See 4/20/2011 FDA Warning Letter to Diaspora Tea & Herb Co., LLC attached
28 hereto as Exhibit J.

1 the product does not disclose a nutrient with an established RDI. Here, Enlightened
2 Kombucha similarly claims to contain “powerful antioxidants” and have a “high
3 nutritional value,” even though the products do not contain any antioxidant nutrients
4 with established RDIs.

5 ~~59-60~~. The FDA further clarified the requirements of 21 C.F.R. 101.54(g) in
6 compliance guides concerning the use of the term “antioxidant” on food labels. In a
7 June 2008 “Guidance for Industry” document, the FDA made the requirements of 21
8 C.F.R. 101.54(g) perfectly clear:

9 Does the label claim have to include the name of the nutrient that is an
10 antioxidant, or can the claim simply say “antioxidants?”

11 The names of the nutrients that are the antioxidants must appear in the claim.
12 For example, “high in antioxidant vitamins C and E.”

13 ~~60-61~~. Millennium’s marketing campaign for Enlightened Kombucha is
14 centered on the characterization of the level of antioxidants in the products and the
15 use of nutrient content claims using the term “antioxidant.” However, the labels of
16 Enlightened Kombucha do not state which recognized antioxidant nutrients, if any,
17 are the subject of their antioxidant claims. There is no symbol that refers to another
18 symbol somewhere else on the label followed by the name or names of the nutrients
19 with recognized antioxidant activity. For these reasons, Enlightened Kombucha is
20 misbranded in violation of parallel state and federal laws.

21 ~~61-62~~. Enlightened Kombucha does not contain a single antioxidant nutrient
22 with an established RDI. If Enlightened Kombucha in fact contains any antioxidant
23 nutrients with an established RDI, such information is solely within ~~Defendant’s~~
24 Millennium’s possession and consumers cannot reasonably obtain such information.
25 Further, if ~~Defendant’s~~ Millennium’s antioxidant claims in fact refer to any
26 antioxidant nutrients with an established RDI, the identity of such nutrients is solely
27 within ~~Defendant’s~~ Millennium’s possession and consumers cannot reasonably

1 obtain such information. This information is material to Plaintiffs and the Class, and
2 the withholding of such information is misleading and misbrands the products.

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8 **Consumers Are Misled By Millennium's Unlawful Antioxidant Marketing**

9 62-63. Millennium's antioxidant advertising is a calculated ruse to capitalize
10 on consumers demand for products with antioxidants.¹⁹ However, identical federal,
11 California, and New York law bans such advertising because it is misleading.

12 63-64. The FDA specifically proposed paragraph (g) to 21 C.F.R. 101.54 to
13 "ensure that consumers are not confused or misled" by nutrient content claims using
14 the term "antioxidants." The FDA's proposal to add a regulation to standardize
15 nutrient content claims using the term "antioxidants" followed an informal FDA
16 survey that found that claims like "high in antioxidants" often referred "to a variety
17 of nutrients and other dietary ingredients that are present in widely varying
18 amounts." The FDA concluded that such inconsistent use of antioxidant nutrient
19 content claims "leads to consumer confusion."

20 64-65. The FDA noted that part of the confusion stems from the fact that:

21 The term 'antioxidants' is unique in comparison to the names of other
22 nutrients associated with nutrient content claims. Unlike previously approved
23 nutrient content claims that characterize the level of a particular nutrient (e.g.,
24 'low sodium'), a term such as 'high in antioxidants' ties a claim (i.e., 'high')

25 ¹⁹ According to a consumer survey by Bossa Nova, half of adults rank antioxidants as
26 the top nutrient they are most concerned about adding to their diets – ahead of
27 calcium, fiber and iron. See New Survey Finds Antioxidants #1 Nutrient Concern
28 Amongst Consumers, PR Newswire. <http://www.prnewswire.com/news-releases/new-survey-finds-antioxidants-1-nutrient-concern-amongst-consumers-106440093.html>.

1 to a class of nutrients that share a specific characteristic (i.e., they are
2 antioxidants) whose very name indicates a metabolic function.

3 ~~65-66~~. Accordingly, because the use of the term “antioxidant” implies health
4 benefits, the FDA specifically sought to curtail the use of antioxidant statements
5 related to food products that do not contain antioxidant nutrients recommended for
6 the daily diet. In the FDA’s view, consumers are misled and confused when
7 products like Enlightened Kombucha are advertised as “packed” with antioxidants,
8 “high in” antioxidants, a source of “many” antioxidants, or containing a “blend” of
9 “powerful antioxidants” when those products do not contain an essential nutrient
10 with recognized antioxidant activity that also has an established RDI.

11 ~~66-67~~. For example, the statement that Enlightened Kombucha provides a
12 “unique blend” of “powerful antioxidants” misleadingly suggests that the beverages
13 provide superior antioxidant content than foods and beverages with antioxidant
14 nutrients like vitamin C that have antioxidant properties as well as nutritional value.
15 Likewise, the statement that Enlightened Kombucha has “more antioxidants than
16 blueberries” misleadingly suggests that the beverages provide superior antioxidant
17 content to blueberries, even though blueberries contain Vitamins A and C and the
18 mineral Magnesium, which have established RDIs and are recognized as a
19 *nutritional* source of antioxidants. Contrary to Millenniums’ labeling statements that
20 tout the antioxidant content of its tea beverages, the FDA has determined that
21 antioxidant vitamins, rather than teas like Enlightened Kombucha, are the superior
22 method for incorporating antioxidants in the daily diet. In other words, the
23 characterization of the word “antioxidant” on Enlightened Kombucha’s labels
24 deceives consumers into believing that Enlightened Kombucha provides more
25 antioxidants and are superior to foods that contain the requisite amount of real
26 nutrients that the FDA has determined provide antioxidants and are essential to daily
27 human nutrition.

1 67-68. Medical professionals agree with the FDA. For example, Jeffrey B.
2 Blumberg, PhD, a professor and the director of the Antioxidants Research
3 Laboratory at Tufts University explained that the one “problem” with the
4 “Antioxidant Message” that products are “high or rich in antioxidants” is that it
5 deceives consumers by “making people think it’s no longer the vitamins, minerals, or
6 fiber but only the phytochemicals that promote health ... But the reason plant foods
7 are good for you is because of everything they contain. There’s synergy for all of
8 these ingredients – synergies between ingredients in one food and between multiple
9 foods.”²⁰

10 68-69. The Harvard School of Public Health has also opined that it is critical to
11 differentiate between different types of antioxidants, as the FDA has done through its
12 requirement that manufacturers list nutrients with established RDI’s any time they
13 make nutrient content claims using the term “antioxidant.” The Harvard School of
14 Public Health Nutrition Source, an online publication of the School of Public Health,
15 instructs that “using the term ‘antioxidant’ to refer to substances is misleading. It is
16 really a chemical property, namely, the ability to act as an electron donor. Some
17 substances that act as antioxidants in one situation may be prooxidants—electron
18 grabbers—in a different chemical milieu. Another big misconception is that
19 antioxidants are interchangeable. They aren’t. Each one has unique chemical
20 behaviors and biological properties. They almost certainly evolved as parts of
21 elaborate networks, with each different substance (or family of substances) playing
22 slightly different roles. This means that no single substance can do the work of the
23 whole crowd.”²¹

24 ²⁰ *That’s why the Dietary Guidelines for Americans recommends we consume a*
25 *diversity of fruits, vegetables, and whole grains.”* Palmer, Sharon, *Dietary*
26 *Antioxidants – Do Foods and Supplements With High Antioxidant Values Guarantee*
27 *Better Health?* Vol. 15 No. 4 P. 42 (Apr. 2013) (emphasis added) available at
28 <http://www.todaysdietitian.com/newarchives/040113p42.shtml>.

29 ²¹ *Antioxidants: Beyond the Hype*, Harvard School of Public Health Source, available
30 at <http://www.hsph.harvard.edu/nutritionsource/antioxidants/>

1 ~~69-70~~. The FDA's and Dr. Blumberg's conclusions about consumer confusion
2 are well founded, as a "recent study conducted by researchers at the University of
3 Houston found that simply placing a healthy euphemism [like antioxidant] on a food
4 package made people believe it was healthier than others that made no obvious
5 health claims." ²² Here Enlightened Kombucha misleads consumers into believing
6 that the products are superior because they contain a "unique blend" of "powerful
7 antioxidants," even though the products do not contain a single nutrient with
8 recognized antioxidant activity *and* with an established RDI. The few nutrients in
9 Enlightened Kombucha that do have established RDI's, such as Vitamin B, are not
10 antioxidants. Enlightened Kombucha advertising goes so far as to claim that it
11 contains "more antioxidants than blueberries," even though blueberries contain
12 antioxidant nutrients with established RDI's while Enlightened Kombucha does not.

13 ~~70-71~~. Millennium has made, and continues to make, unlawful and misleading
14 claims on the food labels of Enlightened Kombucha that are prohibited by identical
15 federal, California, and New York law and which render these products misbranded.
16 Under federal, California, and New York law, Enlightened Kombucha cannot legally
17 be manufactured, distributed, held, or sold.

18 **CLASS REPRESENTATION ALLEGATIONS**

19 ~~71-72~~. Plaintiffs bring this action as a class action under Federal Rule of Civil
20 Procedure 23 on behalf of a Class consisting of all persons in the United States who,
21 within the relevant statute of limitations period, purchased Enlightened Kombucha.

22 ~~72-73~~. Plaintiff Manire also seeks to represent a subclass defined as all
23 members of the Class who purchased Enlightened Kombucha in California (the
24 "California Subclass").

25
26
27 ²² See *Healthy Labels Magic Words Regardless of Food Inside* (June 19, 2014)
28 available at <http://guardianlv.com/2014/06/healthy-labels-magic-words-regardless-of-the-food-inside/>

1 ~~73~~74. Plaintiffs Manire and Retta also seek to represent a subclass defined as
2 all members of the Class who purchased Enlightened Kombucha in New York (the
3 “New York Subclass”).

4 ~~74~~75. Plaintiffs reserve the right to amend or modify the Class definition with
5 greater specificity or further division into subclasses or limitation to particular issues
6 as discovery and the orders of this Court warrant.

7 ~~75~~76. Excluded from the Class are the Defendants~~s~~, the officers and directors
8 of the Defendants~~s~~ at all relevant times, members of their immediate families and
9 their legal representatives, heirs, successors or assigns and any entity in which
10 Defendants~~s~~ ~~has~~have or had a controlling interest.

11 ~~76~~77. Also excluded from the Class are persons or entities that purchased
12 Enlightened Kombucha for purposes of resale.

13 ~~77~~78. Plaintiffs are members of the Class they seek to represent.

14 ~~78~~79. Defendants~~s~~ ~~sells~~ hundreds of thousands, if not millions, of bottles of
15 Enlightened Kombucha. Enlightened Kombucha is available in major supermarkets
16 nationwide, including in California and New York. Accordingly, members of the
17 Class are so numerous that their individual joinder herein is impracticable. The
18 precise number of Class members and their identities are unknown to Plaintiffs at
19 this time but may be determined through discovery. Class members may be notified
20 of the pendency of this action by mail and/or publication through the distribution
21 records of Defendants~~s~~, third party retailers, and vendors.

22 ~~79~~80. Common questions of law and fact exist as to all Class members and
23 predominate over questions affecting only individual Class members. Common legal
24 and factual questions include, but are not limited to whether Enlightened Kombucha
25 is misbranded, and whether the labeling, marketing and promotion of Enlightened
26 Kombucha is false and misleading.

1 ~~80-81~~ The claims of the named Plaintiffs are typical of the claims of the Class
2 in that the named Plaintiffs were exposed to and relied on Defendant²'s² false,
3 misleading and misbranded labels, purchased Enlightened Kombucha, and suffered
4 losses as a result of those purchases.

5 ~~81-82~~ Plaintiffs are adequate representatives of the Class because their
6 interests do not conflict with the interests of the Class members they seek to
7 represent, they have retained competent counsel experienced in prosecuting class
8 actions, and they intend to prosecute this action vigorously. The interests of Class
9 members will be fairly and adequately protected by Plaintiffs and their counsel.

10 ~~82-83~~ The class mechanism is superior to other available means for the fair
11 and efficient adjudication of the claims of the Class members. Each individual Class
12 member may lack the resources to undergo the burden and expense of individual
13 prosecution of the complex and extensive litigation necessary to establish
14 Defendant²'s² liability. Individualized litigation increases the delay and expense to
15 all parties and multiplies the burden on the judicial system presented by the complex
16 legal and factual issues of this case. Individualized litigation also presents a
17 potential for inconsistent or contradictory judgments. In contrast, the class action
18 device presents far fewer management difficulties and provides the benefits of single
19 adjudication, economy of scale, and comprehensive supervision by a single court on
20 the issue of Defendant²'s² liability. Class treatment of the liability issues will ensure
21 that all claims and claimants are before this Court for consistent adjudication of the
22 liability issues.

23 **COUNT I**

24 **Violation Of California's Consumers Legal Remedies Act,**
25 **California Civil Code §§ 1750, et seq.**

26 ~~83-84~~ Plaintiffs hereby incorporate by reference the allegations contained in
27 all preceding paragraphs of this complaint.

1 84-85. Plaintiffs Retta, Schofield, and Manire bring this claim individually and
2 on behalf of members of the proposed Class against ~~Defendant~~ Millennium. Plaintiff
3 Manire also brings this claim individually and on behalf of members of the proposed
4 California Subclass against both Defendants.

5 85-86. Plaintiffs and Class members are consumers who purchased Enlightened
6 Kombucha for personal, family or household purposes. Plaintiffs and the Class are
7 “consumers” as that term is defined by the CLRA in Cal. Civ. Code § 1761(d).
8 Plaintiffs and the Class members are not experts with the independent knowledge of
9 the character, effectiveness, nature, level, or amount of antioxidants found in
10 Enlightened Kombucha or kombucha beverages generally. Plaintiffs and the Class
11 members are not experts with the independent knowledge of the fermentation
12 process or alcohol level of Enlightened Kombucha or kombucha beverages
13 generally.

14 86-87. The Enlightened Kombucha that Plaintiffs and Class members
15 purchased from ~~Defendants~~ were “goods” within the meaning of Cal. Civ. Code §
16 1761(a).

17 87-88. ~~Defendant’s~~ actions, representations, and conduct have violated, and
18 continue to violate the CLRA, because they extend to transactions that intended to
19 result, or which have resulted in, the sale of goods to consumers.

20 88-89. ~~Defendant’s Millennium’s~~ antioxidant nutrient content claims including,
21 (a) “It has a lighter and smoother personality than our original formula with the same
22 high nutritional value that you expect from us. With a unique blend of proprietary
23 probiotics and powerful antioxidants, each bottle is designed to nourish your body
24 from inside out,” and (b) “Often called ‘runner’s food’, chia is a nutrient-rich
25 superfood that provides sustained energy for your body. Packed with more than 8
26 times the omega-3s found in salmon, this small seed has big nutritional value. With
27 more antioxidants than blueberries and more fiber than oatmeal, see for yourself how
28

chia brings new life to our GT's Kombucha" characterize the level of antioxidants in Enlightened Kombucha because (1) there are no nutrients with recognized antioxidant properties with RDIs in Enlightened Kombucha and (2) the antioxidant nutrient content claims do not include the nutrients that are the subject of the claims or use a symbol to link the term "antioxidant" to those nutrients. Because ~~Defendant's Millennium's~~ nutrient content claims do not comply with 21 C.F.R. § 101.54(g), Defendants sold misbranded products in California and nationwide during the Class Period.

~~89,90.~~ Further, ~~Defendant's Defendants'~~ representation that Enlightened Kombucha only has a "trace amount of alcohol" and the absence of the government warning concerning alcoholic beverages on the labels of Enlightened Kombucha make such advertising false and misleading to a reasonable consumer, including Plaintiffs, because Enlightened Kombucha in fact contains above 0.5 percent alcohol by volume, making the product an alcoholic beverage that must bear the appropriate warning under state and federal law. Further, the lack of appropriate warning on the labels of Enlightened Kombucha, in addition to the fact that the beverage is sold to persons under 21 years of age, is a serious health hazard to consumers because such beverages are purchased by minors and because uninformed consumers purchase the products before driving a vehicle, operating machinery, and during pregnancy. The lack of appropriate warning and disclaimers is further a health hazard because the beverages are unwittingly consumed by persons struggling with alcohol addiction. Without the appropriate warning and notice that the beverage is alcoholic, Enlightened Kombucha is an unreasonably dangerous product that is unfit for sale.

~~90,91.~~ California's Consumers Legal Remedies Act, Cal. Civ. Code § 1770(a)(5), prohibits "[r]epresenting that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection

1 which he or she does not have.” By engaging in the conduct set forth herein,
2 Defendant~~s~~ violated and continue~~s~~ to violate Section 1770(a)(5) of the CLRA,
3 because Defendant~~s~~’ conduct constitutes unfair methods of competition and unfair
4 or fraudulent acts or practices, in that ~~it~~ Defendants misrepresent~~s~~ the particular
5 characteristics, benefits and quantities of the goods.

6 ~~91-92~~ Cal. Civ. Code § 1770(a)(7) prohibits representing that goods or
7 services are of a particular standard, quality, or grade, or that goods are of a
8 particular style or model, if they are of another. By engaging in the conduct set forth
9 herein, Defendant~~s~~ violated and continue~~s~~ to violate Section 1770(a)(7) of the
10 CLRA, because Defendant~~s~~’ conduct constitutes unfair methods of competition and
11 unfair or fraudulent acts or practices, in that ~~it~~ Defendants misrepresent~~s~~ the
12 particular standard, quality or grade of the goods.

13 ~~92-93~~ Cal. Civ. Code § 1770(a)(9) further prohibits “[a]dvertising goods or
14 services with intent not to sell them as advertised.” By engaging in the conduct set
15 forth herein, Defendant~~s~~ violated and continue~~s~~ to violate Section 1770(a)(9),
16 because Defendant~~s~~’ conduct constitutes unfair methods of competition and unfair
17 or fraudulent acts or practices, in that ~~it~~ Defendants advertise~~s~~ goods with the intent
18 not to sell the goods as advertised.

19 ~~93-94~~ Plaintiffs and Class members are not experts about the character,
20 effectiveness, nature, level, or amount of antioxidants found in Enlightened
21 Kombucha or kombucha beverages in general. Plaintiffs and the Class members are
22 not experts with the independent knowledge of the fermentation process or alcohol
23 level of Enlightened Kombucha or kombucha beverages generally. Plaintiffs and the
24 Class acted reasonably when they purchased Enlightened Kombucha based on their
25 belief that Defendant~~s~~’ representations were true and lawful.

26 ~~94-95~~ Plaintiffs and the Class suffered injuries caused by Defendant~~s~~ because
27 (a) they would not have purchased Enlightened Kombucha absent Defendant~~s~~’
28

1 representations and omission of a warning concerning the product's alcohol content;
2 (b) they would not have purchased Enlightened Kombucha on the same terms absent
3 Defendant's representations and omissions; (c) they paid a price premium for
4 Enlightened Kombucha due to Defendant's misrepresentations and unauthorized
5 nutrient content claims; and (d) Enlightened Kombucha did not have the
6 characteristics, benefits, or quantities as promised.

7 96. On or about February 4, 2015, prior to filing this action, a CLRA notice
8 letter was served on ~~Defendant Millennium~~ which complies in all respects with
9 California Civil Code § 1782(a). Plaintiffs Retta, Schofield, and Manire,
10 collectively, on behalf of themselves and the proposed Class, served a letter via
11 certified mail, return receipt requested, advising Millennium that it is in violation of
12 the CLRA and demanding that it cease and desist from such violations and make full
13 restitution by refunding the monies received therefrom. A true and correct copy of
14 Plaintiffs' letter is attached hereto as Exhibit K.

15 95-97. On or about November 17, 2015, a CLRA notice letter was served
16 Defendant Whole Foods Market, Inc., which complies in all respects with California
17 Civil Code § 1782(a). Plaintiffs Retta, Schofield, and Manire, collectively, on behalf
18 of themselves and the proposed Class, served a letter via certified mail, return receipt
19 requested, advising Defendant Whole Foods Market, Inc. that it is in violation of the
20 CLRA and demanding that it cease and desist from such violations and make full
21 restitution by refunding the monies therefrom. A true and correct copy of Plaintiffs'
22 letter is attached hereto as Exhibit L.

23 96-98. Wherefore, Plaintiffs seek damages, restitution, and injunctive relief for
24 these violations of the CLRA.

25 **COUNT II**

26 **Violation Of California's Unfair Competition Law,**
27 **California Business & Professions Code §§ 17200, et seq.**

1 ~~97-99.~~ Plaintiffs hereby incorporate by reference the allegations contained in
2 all preceding paragraphs of this complaint.

3 ~~98-100.~~ Plaintiffs Retta, Schofield, and Manire bring this claim
4 individually and on behalf of the members of the proposed Class against
5 ~~Defendant Millennium.~~

6 ~~99-101.~~ Plaintiff Manire also brings this claim individually and on behalf
7 of members of the proposed California Subclass against ~~both Defendants.~~

8 ~~100-102.~~ Defendants ~~is~~are subject to California's Unfair Competition Law,
9 Cal. Bus. & Prof. Code §§ 17200, *et seq.* The UCL provides, in pertinent part:
10 "Unfair competition shall mean and include unlawful, unfair or fraudulent business
11 practices and unfair, deceptive, untrue or misleading advertising"

12 ~~101-103.~~ ~~Defendant's Millennium's~~ antioxidant nutrient content claims
13 including, (a) "It has a lighter and smoother personality than our original formula
14 with the same high nutritional value that you expect from us. With a unique blend of
15 proprietary probiotics and powerful antioxidants, each bottle is designed to nourish
16 your body from inside out," and (b) "Often called 'runner's food', chia is a nutrient-
17 rich superfood that provides sustained energy for your body. Packed with more than
18 8 times the omega-3s found in salmon, this small seed has big nutritional value.
19 With more antioxidants than blueberries and more fiber than oatmeal, see for
20 yourself how chia brings new life to our GT's Kombucha" characterize the level of
21 antioxidants in Enlightened Kombucha because (1) there are no nutrients with
22 recognized antioxidant properties with RDIs in Enlightened Kombucha and (2) the
23 antioxidant nutrient content claims do not include the nutrients that are the subject of
24 the claims or use a symbol to link the term "antioxidant" to those nutrients. Because
25 ~~Defendant's Millennium's~~ nutrient content claims do not comply with 21 C.F.R. §
26 101.54(g), ~~Defendant Millennium~~ sold misbranded products in California and
27 nationwide during the Class Period.

1 ~~102~~.104. Further, Defendant's² representation that Enlightened Kombucha
2 only has a "trace amount of alcohol" and the absence of the government warning
3 concerning alcoholic beverages on the labels of Enlightened Kombucha make such
4 advertising false and misleading to a reasonable consumer, including Plaintiffs,
5 because Enlightened Kombucha in fact contains above 0.5 percent alcohol by
6 volume, making the product an alcoholic beverage that must bear the appropriate
7 warning under state and federal law. Further, the lack of appropriate warning on the
8 labels of Enlightened Kombucha, in addition to the fact that the beverage is sold to
9 persons under 21 years of age, is a serious health hazard to consumers because such
10 beverages are purchased by minors and because uninformed consumers purchase the
11 products before driving a vehicle, operating machinery, and during pregnancy. The
12 lack of appropriate warning and disclaimers is further a health hazard because the
13 beverages are unwittingly consumed by persons struggling with alcohol addiction.
14 Without the appropriate warning and notice that the beverage is alcoholic,
15 Enlightened Kombucha is an unreasonably dangerous product that is unfit for sale.

16 ~~103~~.105. Defendant's² business practices, described herein, violated the
17 "unlawful" prong of the UCL by violating Section 403(r) of the FDCA [21 U.S.C.
18 343(r)(1)(a)], California Health & Safety Code § 110670, 27 C.F.R. § 16, California
19 Health & Safety Code Section 25249.2, the CLRA, the FAL and other applicable law
20 as described herein.

21 ~~104~~.106. Defendant's² business practices, described herein, violated the
22 "unfair" prong of the UCL in that their conduct is substantially injurious to
23 consumers, offends public policy, and is immoral, unethical, oppressive, and
24 unscrupulous, as the gravity of the conduct outweighs any alleged benefits.
25 Defendants² advertising is of no benefit to consumers, and has been declared
26 misleading to consumers by the FDA, medical professionals, and research
27 institutions. Creating consumer confusion regarding the properties and benefits of
28

1 antioxidants is of no benefit to consumers. ~~Millennium's~~ Defendant's failure to
2 comply with FDCA and parallel California labeling requirements and deceptive
3 advertising concerning the nature and effectiveness of antioxidants in Enlightened
4 Kombucha offends the public policy advanced by the Act "to protect the public
5 health" by ensuring that "foods are safe, wholesome, sanitary, and properly labeled."
6 21 U.S.C. § 393(b)(2)(A). Further, Defendant's² advertising of Enlightened
7 Kombucha as the non-alcoholic version of ~~its~~ Millennium's "Classic" line and the
8 fact that the labels of Enlightened Kombucha do not bear warnings concerning the
9 presence of significant amounts of alcohol causes the products to pose a threat to
10 public health, safety, and morality. Consumers are unwittingly purchasing and
11 consuming Enlightened Kombucha products prior to driving a car or operating
12 machinery and while pregnant or under 21 years of age. Further, many consumers
13 may have religious or moral objections to the consumption of alcoholic beverages
14 and would not buy Enlightened Kombucha under any circumstances, even if the
15 presence of alcohol was disclosed. Such practices are of no benefit to consumers.

16 ~~105-107.~~ Defendants violated the "fraudulent" prong of the UCL by
17 misleading Plaintiffs and the Class to believe that the nutrient content claims made
18 about Enlightened Kombucha were lawful, authorized claims that met the minimum
19 nutritional requirements for such claims, as described herein. Defendants further
20 violated the fraudulent prong of the UCL by misleading Plaintiffs and the Class to
21 believe that Enlightened Kombucha is a non-alcoholic beverage when, in fact, it
22 contains a substantial amount of alcohol.

23 ~~106-108.~~ Plaintiffs and Class members are not experts about the character,
24 effectiveness, nature, level, or amount of antioxidants found in Enlightened
25 Kombucha or kombucha beverages in general. Plaintiffs and the Class members are
26 not experts with the independent knowledge of the fermentation process or alcohol
27 level of Enlightened Kombucha or kombucha beverages generally. Plaintiffs and the

1 Class acted reasonably when they purchased Enlightened Kombucha based on their
2 belief that Defendants^{'s} representations were true and lawful.

3 ~~107.~~109. Plaintiffs and the Class lost money or property as a result of
4 Defendants^{'s} UCL violations because (a) they would not have purchased
5 Enlightened Kombucha absent Defendant^{'s} representations and omission of a
6 warning concerning the product's alcohol content; (b) they would not have
7 purchased Enlightened Kombucha on the same terms absent Defendants^{'s}
8 representations; (c) they paid a price premium for Enlightened Kombucha due to
9 Defendants^{'s} misrepresentations and unauthorized nutrient content claims; and (d)
10 Enlightened Kombucha did not have the characteristics, benefits, or quantities as
11 promised.

12 **COUNT III**

13 **Violation Of California's False Advertising Law,**
14 **California Business & Professions Code §§ 17500, et seq.**

15 ~~108.~~110. Plaintiffs hereby incorporate by reference the allegations
16 contained in all preceding paragraphs of this complaint.

17 ~~109.~~111. Plaintiffs Retta, Schofield, and Manire bring this claim
18 individually and on behalf of the members of the proposed Class against
19 ~~Defendant~~Millennium.

20 ~~110.~~112. Plaintiff Manire also brings this claim individually and on behalf
21 of the members of the proposed California Subclass against both Defendants.

22 ~~111.~~113. California's False Advertising Law, Cal. Bus. & Prof. Code §§
23 17500, *et seq.*, makes it "unlawful for any person to make or disseminate or cause to
24 be made or disseminated before the public in this state, ... in any advertising device
25 ... or in any other manner or means whatever, including over the Internet, any
26 statement, concerning ... personal property or services, professional or otherwise, or
27 performance or disposition thereof, which is untrue or misleading and which is

1 known, or which by the exercise of reasonable care should be known, to be untrue or
2 misleading.”

3 ~~112, 114.~~ 114. Defendants engaged in a scheme of offering misbranded bottles
4 of Enlightened Kombucha for sale to Plaintiffs and the Class members by way of
5 product packaging, labeling, and other promotional materials. These materials
6 misrepresented and/or omitted the true content and nature of the misbranded bottles
7 of Enlightened Kombucha. ~~Defendant's Millennium's~~ advertisements and
8 inducements were made in and originated from California and come within the
9 definition of advertising as contained in Bus. & Prof. Code § 17500, *et seq.* in that
10 the product packaging, labeling, and promotional materials were intended as
11 inducements to purchase Enlightened Kombucha, and are statements disseminated
12 by Defendants to Plaintiffs and Class members. Defendants knew that these
13 statements were unauthorized, inaccurate, and misleading.

14 ~~113, 115.~~ 115. ~~Defendant's Millennium's~~ antioxidant nutrient content claims
15 including, (a) “It has a lighter and smoother personality than our original formula
16 with the same high nutritional value that you expect from us. With a unique blend of
17 proprietary probiotics and powerful antioxidants, each bottle is designed to nourish
18 your body from inside out,” and (b) “Often called ‘runner’s food’, chia is a nutrient-
19 rich superfood that provides sustained energy for your body. Packed with more than
20 8 times the omega-3s found in salmon, this small seed has big nutritional value.
21 With more antioxidants than blueberries and more fiber than oatmeal, see for
22 yourself how chia brings new life to our GT’s Kombucha” characterize the level of
23 antioxidants in Enlightened Kombucha because (1) there are no nutrients with
24 recognized antioxidant properties with RDIs in Enlightened Kombucha and (2) the
25 antioxidant nutrient content claims do not include the nutrients that are the subject of
26 the claims or use a symbol to link the term “antioxidant” to those nutrients. Because
27 ~~Defendant's Millennium's~~ nutrient content claims do not comply with 21 C.F.R. §

1 101.54(g), Defendant~~s~~ sold misbranded products in California and nationwide during
2 the Class Period.

3 ~~114.116.~~ Further, Defendant~~s~~' representation that Enlightened Kombucha
4 only has a "trace amount of alcohol" and the absence of the government warning
5 concerning alcoholic beverages on the labels of Enlightened Kombucha make such
6 advertising false and misleading to a reasonable consumer, including Plaintiffs,
7 because Enlightened Kombucha in fact contains above 0.5 percent alcohol by
8 volume, making the product an alcoholic beverage that must bear the appropriate
9 warning under state and federal law. Further, the lack of appropriate warning on the
10 labels of Enlightened Kombucha is a serious health hazard to consumers because
11 such beverages are purchased by minors and because uninformed consumers
12 purchase the products before driving a vehicle, operating machinery, and during
13 pregnancy. The lack of appropriate warning and disclaimers is further a health
14 hazard because the beverages are unwittingly consumed by persons struggling with
15 alcohol addiction. Without the appropriate warning and notice that the beverage is
16 alcoholic, Enlightened Kombucha is an unreasonably dangerous product that is unfit
17 for sale.

18 ~~115.117.~~ Defendant~~s~~ violated § 17500, *et seq.* by misleading Plaintiffs and
19 the Class to believe that the nutrient content claims made about Enlightened
20 Kombucha were lawful, authorized claims that met the minimum nutritional
21 requirements for such claims, as described herein. Defendant~~s~~ also violated § 17500,
22 *et seq.* by misleading Plaintiffs and the Class to believe that Enlightened Kombucha
23 is a non-alcoholic beverage when, in fact, it contains a substantial amount of alcohol.

24 ~~116.118.~~ Defendant Millennium knew or should have known, through the
25 exercise of reasonable care that Enlightened Kombucha was and continues to be
26 misbranded, and that their representations about the antioxidant nutrient content of
27 Enlightened Kombucha were unauthorized, inaccurate, and misleading. Defendant~~s~~
28

1 also knew or should have known, through the exercise of reasonable care that
2 Enlightened Kombucha is an alcoholic beverage and that Defendant²'s
3 representations to the contrary are not true.

4 ~~117~~119. Plaintiffs and the Class lost money or property as a result of
5 Defendant²'s FAL violation because (a) they would not have purchased Enlightened
6 Kombucha absent Defendant²'s representations and omission of a warning
7 concerning the product's alcohol content; (b) they would not have purchased
8 Enlightened Kombucha on the same terms absent Defendant²'s representations; (c)
9 they paid a price premium for Enlightened Kombucha due to Defendant²'s
10 misrepresentations and unauthorized nutrient content claims; and (d) Enlightened
11 Kombucha did not have the characteristics, benefits, or quantities as promised.

12 **COUNT IV**

13 **Violation of New York's Deceptive and Unfair Trade Practices Act.**

14 **New York General Business Law § 349, et seq.**

15 ~~118~~120. Plaintiffs Retta and Manire hereby incorporate by reference the
16 allegations contained in all preceding paragraphs of this complaint.

17 ~~119~~121. Plaintiffs Retta and Manire bring this claim individually and on
18 behalf of the members of the proposed New York Subclass against both Defendants.

19 ~~120~~122. Any person who has been injured by reason of any violation of
20 the NY GBL § 349 may bring an action in her own name to enjoin such unlawful act
21 or practice, an action to recover her actual damages or fifty dollars, whichever is
22 greater, or both such actions. The court may, in its discretion, increase the award of
23 damages to an amount not to exceed three times the actual damages up to one
24 thousand dollars, if the court finds the ~~defendant~~ Defendants willfully or knowingly
25 violated this section. The court may award reasonable attorney's fees to a prevailing
26 plaintiff.
27
28

1 ~~121,123.~~ Defendant's Millennium's antioxidant nutrient content claims
2 including, (a) "It has a lighter and smoother personality than our original formula
3 with the same high nutritional value that you expect from us. With a unique blend of
4 proprietary probiotics and powerful antioxidants, each bottle is designed to nourish
5 your body from inside out," and (b) "Often called 'runner's food', chia is a nutrient-
6 rich superfood that provides sustained energy for your body. Packed with more than
7 8 times the omega-3s found in salmon, this small seed has big nutritional value.
8 With more antioxidants than blueberries and more fiber than oatmeal, see for
9 yourself how chia brings new life to our GT's Kombucha" characterize the level of
10 antioxidants in Enlightened Kombucha because (1) there are no nutrients with
11 recognized antioxidant properties with RDIs in Enlightened Kombucha and (2) the
12 antioxidant nutrient content claims do not include the nutrients that are the subject of
13 the claims or use a symbol to link the term "antioxidant" to those nutrients. Because
14 Defendant's Millennium's nutrient content claims do not comply with 21 C.F.R. §
15 101.54(g), which has been incorporated by reference under New York state
16 regulations, 1 N.Y.C.R.R. § 259.1, Defendants sold misbranded products in New
17 York during the Class Period. Further, Defendant's Millennium's labeling and
18 advertising practices are of no benefit to consumers, and have been declared
19 misleading to consumers by the FDA, medical professionals, and research
20 institutions. Defendant's Millennium's failure to comply with FDCA and parallel
21 New York labeling requirements and deceptive advertising concerning the nature
22 and effectiveness of antioxidants in Enlightened Kombucha offends the public policy
23 advanced by the Act "to protect the public health" by ensuring that "foods are safe,
24 wholesome, sanitary, and properly labeled." 21 U.S.C. § 393(b)(2)(A).
25 Accordingly, Defendant's Millennium's practices are unfair, deceptive, misleading
26 and are in violation of N.Y. Agriculture and Markets Law § 201 in that Enlightened
27 Kombucha is misbranded.

1 ~~122,124.~~ Further, Defendant's² representation that Enlightened Kombucha
2 only has a "trace amount of alcohol" and the absence of the government warning
3 concerning alcoholic beverages on the labels of Enlightened Kombucha make such
4 advertising false and misleading to a reasonable consumer, including Plaintiffs,
5 because Enlightened Kombucha in fact contains above 0.5 percent alcohol by
6 volume, making the product an alcoholic beverage that must bear the appropriate
7 warning under state and federal law. Further, the lack of appropriate warning on the
8 labels of Enlightened Kombucha, in addition to the fact that the beverage is sold to
9 persons under 21 years of age, is a serious health hazard to consumers because such
10 beverages are purchased by minors and because uninformed consumers purchase the
11 products before driving a vehicle, operating machinery, and during pregnancy. The
12 lack of appropriate warning and disclaimers is further a health hazard because the
13 beverages are unwittingly consumed by persons struggling with alcohol addiction.
14 Without the appropriate warning and notice that the beverage is alcoholic,
15 Enlightened Kombucha is an unreasonably dangerous product that is unfit for sale.
16 Further, Defendant's² labeling and advertising practices are of no benefit to
17 consumers, and to the contrary, subject consumers to serious health and safety issues
18 due to the fact that Enlightened Kombucha contains alcohol. Defendant's² failure to
19 comply with FDCA and parallel New York labeling requirements and deceptive
20 advertising concerning the alcohol content of Enlightened Kombucha offends the
21 public policy advanced by the Act "to protect the public health" by ensuring that
22 "foods are safe, wholesome, sanitary, and properly labeled." 21 U.S.C. §
23 393(b)(2)(A). Accordingly, Defendant's² practices are unfair, deceptive,
24 misleading and are in violation of N.Y. Agriculture and Markets Law § 201 in that
25 Enlightened Kombucha is misbranded.

26 ~~123,125.~~ The foregoing deceptive acts and practices were directed at
27 consumers.

1 ~~124.~~126. The foregoing deceptive acts and practices are misleading in a
2 material way because they fundamentally misrepresent the characteristics of
3 Enlightened Kombucha to induce consumers to purchase same.

4 ~~125.~~127. Plaintiffs Retta and Manire and the New York Subclass members
5 suffered a loss as a result of Defendants'~~s~~ deceptive and unfair trade acts.
6 Specifically, as a result of Defendants'~~s~~ deceptive and unfair trade acts and
7 practices, Plaintiffs Retta and Manire and the New York Subclass members suffered
8 monetary losses associated with the purchase of Enlightened Kombucha because (a)
9 they would not have purchased Enlightened Kombucha absent Defendants'~~s~~
10 representations and omission of a warning concerning the product's alcohol content;
11 (b) they would not have purchased Enlightened Kombucha on the same terms absent
12 Defendants'~~s~~ representations; (c) they paid a price premium for Enlightened
13 Kombucha due to Defendants'~~s~~ misrepresentations and unauthorized nutrient
14 content claims; and (c) Enlightened Kombucha did not have the characteristics,
15 benefits, or quantities as promised.

16 **PRAYER FOR RELIEF**

17 WHEREFORE, Plaintiffs, individually and on behalf of all others similarly
18 situated, seek judgment against Defendants, as follows:

- 19 a) For an order certifying the Class under Rule 23 of the Federal Rules of
20 Civil Procedure and naming Plaintiffs Retta, Schofield, and Manire as
21 representatives of the Class and Plaintiffs' attorneys as Class Counsel to
22 represent the Class members;
- 23 b) For an order certifying the California Subclass under Rule 23 of the
24 Federal Rules of Civil Procedure and naming Plaintiff Manire as
25 representative of the California Subclass and Plaintiffs' attorneys as
26 Class Counsel to represent the California Subclass members;
- 27

- 1 c) For an order certifying the New York Subclass under Rule 23 of the
2 Federal Rules of Civil Procedure and naming Plaintiffs Retta and
3 Manire as representatives of the New York Subclass and Plaintiffs'
4 attorneys as Class Counsel to represent the New York Subclass
5 members;
6 d) For an order declaring that Defendants's conduct violates the statutes
7 referenced herein;
8 e) For an order finding in favor of Plaintiffs, the Class, the California
9 Subclass, and the New York Subclass on all counts asserted herein;
10 f) For compensatory and punitive damages in amounts to be determined
11 by the Court and/or jury;
12 g) For prejudgment interest on all amounts awarded;
13 h) For an order of restitution and all other forms of equitable monetary
14 relief;
15 i) For injunctive relief as pleaded or as the Court may deem proper; and
16 j) For an order awarding Plaintiffs and the Class their reasonable
17 attorneys' fees and expenses and costs of suit.

18 **DEMAND FOR TRIAL BY JURY**

19 Plaintiffs demand a trial by jury of all issues so triable.

20
21 Dated: ~~October 8~~February [], 2016

Respectfully submitted,

22 **BURSOR & FISHER, P.A.**

23
24 By: /s/Yeremey Krivoshey
Yeremey Krivoshey

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